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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91199018
Party	Plaintiff Amylin Pharmaceuticals, Inc.
Correspondence Address	JENNIFER FRASER CONNOLLY BOVE LODGE HUTZ LLP PO BOX 2207 WILMINGTON, DE 19801 UNITED STATES trademarks@cblh.com
Submission	Opposition/Response to Motion
Filer's Name	Jennifer Fraser
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Signature	/jf/
Date	04/24/2012
Attachments	Reply to Applicant's Opposition to Opposer's Motion for Sanctions.pdf ( 23 pages )(821368 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In re: Application Serial No. 85/094,790	:	
	:	
Filed: July 28, 2010	:	
	:	
For the Mark: DR. AMLIN	:	Opposition No. 91199018
	:	
Published: March 8, 2011	:	
	:	
Amylin Pharmaceuticals, Inc.,	:	
	:	
Opposer,	:	
	:	
v.	:	Attorney Docket No.: 32377-1
	:	
Amlin Health, LLC	:	
	:	
Applicant.	:	

**REPLY TO APPLICANT'S OPPOSITION TO  
OPPOSER'S MOTION FOR SANCTIONS**

Amylin Pharmaceuticals, Inc. ("Opposer") respectfully submits this Reply to Applicant's paper filed April 15, captioned "Request the Board: Refuses and Does Not Grand (sic) Opposer's Motion for Discovery Sanctions" ("Applicant's Request"). Because this paper in no way addresses Opposer's Motion for Discovery Sanctions, or Applicant's failure to respond to the Board's latest Order, and only illustrates Applicant's delay and disregard for the Rules, Opposer requests the Board grant Opposer's Motion for Discovery Sanctions ("Opposer's Motion"). Opposer respectfully moves for entry of judgment against Amlin Health, LLC ("Applicant") for Applicant's failure to comply with the Board's March 9, 2012 Order ("March 9 Order") to provide Opposer with responses to Opposer's June 29, 2011 First Set of Interrogatories and First

Set of Requests for Production and failure to properly serve its required Rule 26 Initial Disclosures.

## **I. BACKGROUND**

As set forth in Opposer's Motion, and as of the date of this Reply, Opposer has not received any discovery responses from Applicant in response to the Board's March 9 Order, nor any indication when such responses will be forthcoming. Instead, on April 15, Applicant filed a document captioned "Request the Board: Refuses and Does Not Grant (sic) Opposer's Motion for Discovery Sanctions."<sup>1</sup> Opposer interprets this confusing "Request" to be an Opposition to Opposer's Motion and, while the substance of this paper does not provide any defense to failing to provide discovery responses, nor even mention the responses, Opposer must address Applicant's irrelevant statements so the full record is before the Board.<sup>2</sup>

## **II. APPLICANT HAS NOT PROVIDED ANY BASIS FOR DENIAL OF SANCTIONS**

Applicant has not provided any explanation for its failure to respond to Opposer's discovery requests. The period for serving Applicant's discovery responses pursuant to the Board's March 9 Order expired and no request for extension was made to Opposer or the Board prior to the deadline. Applicant's Request in no way addresses Opposer's Motion for Sanctions for violation of the Board's Order, again, and proffers no argument to rebut Opposer's Motion. Moreover, because the time to comply with the Order has expired, if Applicant's Request can

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<sup>1</sup> The Certificate of Service dates do not correspond to the filing date and the date Opposer's counsel received this paper electronically on April 15 nor has an e-mail been sent to counsel's e-mail address of record.

<sup>2</sup> Regrettably, in addition to filing Applicant's Request, Applicant has filed other irrelevant and inappropriate papers and has refused to withdraw them despite Opposer's counsel explaining the impropriety of such papers. Specifically, Applicant filed a bogus "Request for Initial Disclosure to Opposer" apparently under some misguided view that the Board's March 9 Order applied to Opposer when Opposer served its Initial Disclosures on June 24, 2011 and has provided proof of this to Applicant repeatedly. Because Applicant did not withdraw this paper, Opposer filed an Opposition to Applicant's Request for Initial Disclosure and, rather than belabor the obvious, Opposer merely incorporates this paper by reference for the convenience of the Board if additional background is desired.

even be construed as an attempt to reopen time, Applicant must now set forth specific facts explaining the reason for its delay and showing the failure to act during the allotted time is the result of excusable neglect. *See* Trademark Board Manual of Procedure (TBMP) § 509.01.

Applicant has not made any such showing.

As explained in FRCP 6(b) and TBMP 509,

When an act may or must be done within a specified time, the court may, for good cause, extend the time:

....

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

Applicant's Response does not put forth any defense or excuse for violating the Board's March 9 Order, much less an excuse substantiated with the requisite facts to show excusable neglect. *See Pumpkin Ltd. v. Seed Corps.*, 43 USPQ2d 1582, 1586, n. 7 (TTAB 1997). The complete omission of any legitimate facts or substantiated excuses is particularly revealing and egregious in view of the Board's admonitions and guidance that it has repeatedly provided. Applicant's Response does not even mention Opposer's First Set of Interrogatories or First Set of Requests for Production, served *June 29, 2011*, much less its lack of responses to the requests. Yet, Applicant requests the Board refuse Opposer's Motion and attempts to take the focus off its clear violation of several Orders and the Rules by bizarrely accusing Opposer of violating the Board's March 9 Order. Such attempted misdirection does not provide the requisite showing required for a finding of excusable neglect under the Trademark Rules and provides no basis to reopen the time for Applicant's responses to the discovery requests. Furthermore, Applicant's misguided attempts at such misdirection, along with other irrelevant filings and actions, confirm Applicant is interposing papers before the Board for improper purposes and Applicant is

responsible for significant delay and prejudice to Opposer, as well as the Board. Opposer requests the Board grant its Motion and enter judgment against Applicant.

### **III. THE BOARD SHOULD DISREGARD APPLICANT'S "REQUEST"**

The Board should completely disregard Applicant's "Request." Although it is difficult to interpret Applicant's paper, it appears to try to rely on six "reasons" why the Board should deny Opposer's Motion – all of them false, unsubstantiated, previously rejected and easily refuted. Four of the "reasons" are based on Opposer's alleged failure to serve Initial Disclosures (§§ 1, 2, 3, and 6 of Applicant's Request) when Opposer served the Initial Disclosures on June 23, 2011 and Applicant is aware of this. Another "reason" is based on excuses from the year 2011 (§ 5 of Applicant's Request) which were previously rejected by the Board.<sup>3</sup> The final "reason" is based on Applicant's alleged confusion regarding Opposer's basic request that Applicant consent to an amendment to the Notice of Opposition to add a recently issued registration that registered while the proceeding was suspended (§ 4 of Applicant's Request).

First, Opposer did timely and properly serve its Initial Disclosures almost ten months ago on Applicant's then-counsel.<sup>4</sup> Subsequently, that counsel filed a Motion to Withdraw and included, *inter alia*, a certification stating all papers had been delivered to Applicant. Opposer, in being forced to file multiple Motions to Compel and/or for Sanctions, has repeatedly detailed the service of its Initial Disclosures and Applicant has never once complained of not receiving the disclosures. Additionally, Opposer's counsel provided Applicant with another copy of the

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<sup>3</sup> While the "reasons" are confusing, any attempt to use the prior failed excuses such as illness and travel to try and justify what is an ongoing violation of the Rules for 10 months, is completely undercut by Applicant's recent filings and dilatory tactics. If Applicant has so much time to file improper papers and even discovery requests on Opposer, it should have time to provide overdue responses and reply to Board Orders.

<sup>4</sup> These facts are set forth in detail in Opposer's Opposition to Applicant's Request for Initial Disclosures filed April 19, 2012 which also includes the Initial Disclosures, proof of service, etc.

Initial Disclosures on April 9 pointing out the Certificate of Service indicating they were timely served. Thus, Applicant is simply incorrect because Opposer did serve its Initial Disclosures pursuant to the Trademark Rules and for Applicant to perpetuate this falsehood and misrepresent facts and engage in moot and inappropriate motion practice is problematic. Even assuming *arguendo* Opposer did not serve its Initial Disclosures, this would not provide a defense or excuse for Applicant's violation of the Board's March 9 Order and thus paragraphs 1, 2, 3, and 6 of Applicant's Request do not provide a basis to deny Opposer's Motion.

The Board has previously rejected the next purported "reason" that Applicant tries to give to deny Opposer's Motion, namely, that Applicant was sick and out of the country in 2011. Moreover, it is incomprehensible how these vague and unsubstantiated excuses from the year 2011 that were previously rejected can become the basis to deny a Motion that is based on a failure to obey a March 9, 2012 Order and to meet a deadline of March 29, 2012 (and, again, the proffered excuses lack sufficient detail to meet the excusable neglect standard). Paragraph 5 of Applicant's Request clearly does not provide a basis to deny Opposer's Motion.

The final questionable "reason" that Applicant tries to rely on to deny Opposer's Motion is its alleged confusion regarding Opposer's request that it consent to an amendment to the Notice of Opposition. Opposer filed its Notice of Opposition on March 16, 2011 and, since that time, while the proceeding was suspended because Opposer was forced to file two Motions to Compel and/or for Sanctions to obtain the discovery from Applicant, another of Opposer's trademark applications for its AMYLIN mark has issued into Registration No. 4,093,640. As is common Board practice, Opposer intended to amend its Notice of Opposition to include the newly issued '640 Registration.

Under the Trademark rules, “a party may amend its pleading only by written consent of every adverse party or by leave of the Board; and leave must be freely given when justice so requires.” TBMP § 507.02. Opposer attempted to obtain Applicant’s consent as the most efficient method of proceeding with the amendment. Unfortunately, as can be seen by the numerous e-mails to and from Applicant, Applicant did not agree to this proposed amendment and has made clear he will not agree to this proposed amendment (*see* e-mails at Exhibit A). Because of Applicant’s refusal to consent, if this proceeding does go forward, Opposer will be forced to file yet *another* unnecessary Motion to make a routine request to amend its Notice of Opposition.<sup>5</sup> Unfortunately, as has become typical for this Applicant, the simplest procedure becomes complex, wasteful, and costly. Not only is this *not* a proper basis to deny Opposer’s Motion, it typifies Applicant’s pattern of delay and provides further reason to grant Opposer’s Motion and end this proceeding. Paragraph 4 of Applicant’s Request clearly does not provide a basis to deny Opposer’s Motion.

Because Applicant’s Request is irrelevant, improper and non responsive, Opposer respectfully requests the Board disregard Applicant’s Request. According to the TBMP, “any objections which an adverse party may have to the contents of such a brief will be considered by the Board in its determination of the original motion, and any portions of the brief that are found by the Board to be improper will be disregarded.” TBMP § 517. In this case, Applicant’s entire “Request the Board: Refuses and Does Not Grant (sic) Opposer’s Motion for Discovery Sanctions” is improper and should be disregarded. Applicant has not set forth one valid

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<sup>5</sup> Considering the liberal standard for such Motions and the procedural posture of this case, largely because of Applicant’s delay and that Opposer has not received discovery responses, it could not be envisioned how Applicant could be prejudiced. Of course, at the time of Opposer’s request, Applicant had not yet violated the most recent Board Order and, at this time, such a Motion would be premature and potentially moot by the Board’s decision on this Motion for Sanctions.

argument, defense, or excuse that would provide a basis to deny Opposer's Motion and, thus, this Board should grant Opposer's Motion.

This proceeding has been ongoing since March 16, 2011 (well over a year) and it has not progressed past the first round of discovery because of Applicant. Apart from the delay which cannot be ignored, the cost and prejudice to Opposer is significant and ongoing due to Applicant's often incomprehensible papers and confusing correspondence that has not advanced this proceeding at all. The prejudice to Opposer increases exponentially with each piece of ridiculous correspondence and each inappropriately "filed" document. Opposer respectfully requests the Board consider the ever-increasing prejudice to Opposer when considering remedies and sanctions in connection with this matter.

#### **IV. CONCLUSION**

Opposer respectfully requests the Board issue an order 1) entering a default judgment against Applicant; 2) sustaining the instant Opposition and refusing registration of the '790 Application; and/or 3) taking any other appropriate action the Board deems just and proper.

Respectfully submitted,  
Amylin Pharmaceuticals, Inc.

Date: April 24, 2012

/s/ Jennifer Fraser  
Jennifer Fraser  
Christina M. Hillson  
Connolly Bove Lodge & Hutz LLP  
The Nemours Building  
1007 N. Orange Street  
P.O. Box 2207  
Wilmington, DE 19899  
Attorneys for Opposer



**CERTIFICATE OF SERVICE**

I hereby certify that on this 24th day of April 2012 a true and correct copy of the foregoing document was caused to be served on the following party as indicated:

**VIA E-MAIL AND FIRST CLASS MAIL**

Linus Zhang, M.D.  
Amlin Health, LLC  
451 Hungerford Drive  
Suite 119-132  
Rockville, MD 20850  
amlinhealth@gmail.com

/s/ Jennifer Fraser

Jennifer Fraser

# Exhibit

# A

**Breanne M. Staley**

---

**From:** Jennifer Fraser  
**Sent:** Wednesday, March 28, 2012 4:51 PM  
**To:** 'Linus Zhang'  
**Cc:** Virginia Hamel  
**Subject:** Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC

Dear Mr. Zhang,

We are writing to request Amlin Health LLC's consent to amend the Notice of Opposition to add a recently issued registration for AMYLIN, Registration No. 4,093,640 (attached). The Rules require us to seek your consent prior to filing the Motion to Amend so we can indicate whether or not you consented in the Motion.

We plan on filing the Motion on Wednesday, April 4 and would appreciate your reply by Monday, April 2. Please contact me if you have any questions.

Regards,

Jennifer Fraser  
Connolly Bove Lodge & Hutz LLP  
Suite 1100  
1875 Eye Street NW  
Washington, DC 20006  
TEL (202) 756-4356 (direct)  
FAX (202) 293-6229



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**Breanne M. Staley**

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**From:** Jennifer Fraser  
**Sent:** Thursday, March 29, 2012 3:22 PM  
**To:** Christina M. Hillson; Breanne M. Staley; Virginia Hamel  
**Subject:** FW: Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC

From: Linus Zhang [<mailto:amlinhealth@gmail.com>]  
Sent: Thursday, March 29, 2012 2:34 PM  
To: Jennifer Fraser  
Cc: amlinhealth  
Subject: Re: Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC

Dear Jennifer:

Could you please let me know what you are going to amend for the Notice of Opposition?

I really can not do anything now without further information on this issue.

Regards,

Linus Zhang, M.D.

Amlin Health, LLC

451 Hungerford Dr. Ste. 119-132

Rockville, MD 20850

Tel: 301.256.7780

On Mar 28, 2012, at 4:51 PM, Jennifer Fraser wrote:

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1875 Eye Street NW

Washington, DC 20006

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FAX (202) 293-6229

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**Breanne M. Staley**

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This registration issued after filing the initial Notice of Opposition and this matter has been suspended for several months, so no other papers could be filed until recently.

We look forward to hearing from you if you will consent to us filing the Amended Notice of Opposition. Please let me know if you have any questions.

Regards,

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## Breanne M. Staley

---

**From:** Jennifer Fraser  
**Sent:** Friday, March 30, 2012 2:48 PM  
**To:** Christina M. Hillson; Breanne M. Staley; Virginia Hamel  
**Subject:** FW: Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC

From: Linus Zhang [<mailto:amlinhealth@gmail.com>]  
Sent: Friday, March 30, 2012 2:49 PM  
To: Jennifer Fraser  
Cc: amlinhealth  
Subject: Re: Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC

Dear Jennifer:

I am still not clear what you are going to amend.

Please let me know what will happen if we consent OR if we do not consent???

Please specify, thanks.

Regards,

Linus Zhang, M.D.

Amlin Health, LLC

On Mar 29, 2012, at 3:50 PM, Jennifer Fraser wrote:

Dear Dr. Zhang,

In response to your inquiry, we plan on amending the Notice of Opposition to add the recently issued registration attached to our March 28 e-mail, and plead that the AMYLIN mark is also used for the services identified in the registration, and that your mark is also likely to be confused with that AMYLIN mark, similar to what was pleaded with the other registrations in the initial Notice of Opposition.

This registration issued after filing the initial Notice of Opposition and this matter has been suspended for several months, so no other papers could be filed until recently.

We look forward to hearing from you if you will consent to us filing the Amended Notice of Opposition. Please let me know if you have any questions.

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Cc: amlinhealth

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We plan on filing the Motion on Wednesday, April 4 and would appreciate your reply by Monday, April 2. Please contact me if you have any questions.

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**Breanne M. Staley**

---

**From:** Jennifer Fraser  
**Sent:** Monday, April 02, 2012 12:45 PM  
**To:** Virginia Hamel; Breanne M. Staley  
**Subject:** FW: Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC and Registration No. 4,093,640

From: Linus Zhang [<mailto:amlinhealth@gmail.com>]  
Sent: Sunday, April 01, 2012 3:07 PM  
To: Jennifer Fraser  
Cc: amlinhealth  
Subject: Re: Amylin Pharmaceuticals, Inc. v. Amlin Health, LLC and Registration No. 4,093,640

Dear Jennifer:

We, at Amlin Health, LLC do NOT consent to your request below on this issue unless you agree the followings:

- 1--cease any action that oppose to the trademark application of Dr. Amlin;
- 2--cease ongoing disclosure case as soon as possible;
- 3--notify the Board as soon as possible that the opposition (opposition No. 91199018) will be withdrawn and/or has been withdrawn so that we will no longer investigate all the losses of our company.

Again, let me make it clear for this issue, we do NOT consent to your request on amending the Notice of Opposition to add the recently issued registration for AMYLIN, Registration No. 4,093,640, the email and attachment you sent to me on March 28, 2012.

Regards,

Linus Zhang, M.D.

Amlin Health, LLC

451 Hungerford Dr. 119-132

Rockville, MD 20850

Tel: 301.256.7780

email: [amlinhealth@gmail.com](mailto:amlinhealth@gmail.com)

April 1st, 2012 at 3:05pm

On Mar 29, 2012, at 3:50 PM, Jennifer Fraser wrote:

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